80-6151

FEB 5 1981
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

Case No.

AMOS LEE KING,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF FLORIDA

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QUESTION PRESENTED

Whether the excusing for cause of prospective jurors because of their expressed beliefs against the death penalty, but where their answers to questions on voire dire did not make unmistakably clear that their beliefs would Prevent them from considering the case impartially, violated Petitioner's rights under the Sixth and Fourteenth Amendments to the United States Constitution?

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OPINIONS BELOW

The opinion and judgment of the Supreme Court of Florida sought to be reviewed via this petition is not yet officially reported and is reproduced in the appendix. (A1-13)

JURISDICTION OF THE SUPREME COURT

The Supreme Court of Florida issued the opinion and judgment in this case on May 8, 1980. (R1-13) Both the Petitioner and the State of Florida filed motions for rehearing. Petitioner's motion was denied on September 26, 1980, but in the same order, the State of Florida's motion for rehearing was granted. (A14) On December 11, 1980, the Supreme Court of Florida decided the case on rehearing and adhered to the original opinion (A15), making it the judgment sought to be reviewed in this petition. Title 28 United States Code, Section 1257(3) and Rule 17 of the United States Supreme Court Rules confers certiorari jurisdiction in this Court to review the judgment in question.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment VI to the Constitution of the United States:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

Amendment XIV to the Constitution of the United States in part:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 913.13, Florida Statutes:

> Jurors in capital cases.--A person who has beliefs which preclude him from finding a defendant guilty of an offense punishable by death shall not be qualified as a juror in a capital case.

STATEMENT OF THE CASE

A Pinellas County, Florida grand jury indicted Petitioner for First Degree Murder, Sexual Battery, Arson and Burglary. (R784-785)[1/] (A16-17) He was also charged by information with attempted First Degree Murder and Escape for a separate but closely connected incident. (R8-9) (A18-19) Petitioner pleaded not guilty and proceeded to a single jury trial on both cases which were consolidated over Petitioner's objections. (R17,793,2147) At trial, he was convicted of all charges. (R2012-2015) The jury recommended a death sentence for the First Degree Murder convictions (2048-2049)(A20-21), and the trial court imposed death. (R1076-1077,2049)(A20-23). Petitioner received

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1/ References to the record on appeal in the Supreme Court of Florida are designated "R" followed by the page number. Pertinent portions of the record are reproduced in the Appendix to this petition and are also designated with "A" followed by the Appendix page number.

varying terms of imprisonment on the remaining charges. (R2049-2052)

During jury selection, the trial court excused for cause a prospective juror who expressed her belief against capital punishment. (R2242-2244)(A24-26) The colloquy proceeded as follows:

> THE COURT: Mrs. Holenda and Mrs. King, did I ask you these questions also with respect to the penalty?
>
> VENIREWOMAN HOLENDA: You didn't ask. I'm sorry, I don't believe that I could be impartial. I'm against capital punishment.
>
> THE COURT: Well, here again, as I indicated to Mr. Farmer, even though you are against capital punishment, the jury itself would not be imposing the same. You would be asked to reach a verdict based upon the testimony, the evidence, and the law based as to his guilt or innocence as to each of the charges, and then as to the punishment as it relates to capital punishment. You would then be asked to vote to advise the Court as to what the jury feels would be the proper punishment. I would not be bound by your opinion, however.
>
> VENIREWOMAN HOLENDA: I understand, but I do feel strongly about it. I'm sorry but that's exactly how I feel.
>
> THE COURT: Okay. You may step down.

On appeal to the Supreme Court of Florida, Petitioner argued that the excusal for cause of the prospective juror violated the mandate of Witherspoon v. Illinois, 391 U.S. 510 (1968). (A1-13) The Florida Court affirmed holding:

> We find the venirewoman was properly excused. Her response to the court's inquiry was sufficient to indicate that her reservations about capital punishment would prevent her from making an impartial decision as to the defendant's guilt.

King v. State, __So.2d__ (Fla.1980)(Case No. 52,185, opinion filed May 8th) at slip opinion page 7.

The Supreme Court of Florida affirmed all of Petitioner's convictions. (A1-13) Petitioner's sentences

for sexual battery and attempted murder were remanded, but the remaining sentences, including his death sentence, were affirmed. (A1-13)

REASONS FOR GRANTING THE WRIT

THE EXCUSING FOR CAUSE OF PROSPECTIVE JURORS BECAUSE OF THEIR EXPRESSED BELIEFS AGAINST THE DEATH PENALTY, BUT WHERE THEIR ANSWERS TO QUESTIONS ON VOIR DIRE DID NOT MAKE UNMISTAKABLY CLEAR THAT THEIR BELIEFS WOULD PREVENT THEM FROM CONSIDERING THE CASE IMPARTIALLY, VIOLATED PETITIONER'S RIGHTS UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

This Court's holding in Witherspoon v. Illinois, 391 U.S. 510 (1968) set forth a simple premise:

> ...a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction.

Id. at 522. In footnote 21 of Witherspoon, this Court elaborated and clarified as follows:

> The most that can be demanded of a venireman in this regard is that he be willing to consider all of the penalties provided by state law, and that he not be irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings. If the voir dire testimony in a given case indicates that veniremen were excluded on any broader basis than this, the death sentence cannot be carried out even if applicable statutory or case law in the relevant jurisdiction would appear to support only a narrower ground of exclusion. See nn 5 and 9, supra.
>
> We repeat, however, that nothing we say today bears upon the power of a State to execute a defendant sentenced to death by a jury from which the only veniremen who were in fact excluded for cause were those who made unmistakably clear (1) that they would automa-

> tically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt....

Id. at 522-523. However, the application of this premise has been troublesome. The problems often center around veniremen's responses which are equivocal and do not demonstrate with the required unmistakable clarity that the veniremen would automatically vote against a death sentence or that his attitudes would prevent an impartial decision on the issue of guilt. Petitioner's case presents just such a problem. The trial court's excusing venirewoman Holenda violated the standard announced in Witherspoon.

Both this Court and others have recently been required to address the application of this narrow scope of exclusion of veniremen for cause. E.g., Lockett v. Ohio, 438 U.S. 586 (1978); Burns v. Estelle, 626 F.2d 396 (5th Cir. 1980) In Lockett v. Ohio, this Court held that the veniremen's inability to take an oath to well and truly try the case because of their beliefs against capital punishment was sufficient to show that their attitudes prevented them from being impartial. The Fifth Circuit Court of Appeals sitting en hanc in Burns v. Estelle reversed the denial of a habeas corpus relief holding that veniremen were improperly excluded. The court noted that the prosecutor's questioning did not go far enough to properly disqualify the excluded veniremen. At best, the venire member's response was that attitudes against the death penalty would affect deliberations on guilt issues. In analyzing the case under the Witherspoon standards, the Court noted:

> As to its prong concerning the imposition of the death penalty, she did not testify that she would automatically vote against it, regardless of what the evidence might show. As to its guilt-or-innocence prong, she did not "make unmistakably clear" that her attitude toward the death penalty would prevent her from making an impartial decision as to guilt. These are the two talismans; and had her answers unmistakably and plainly contravened either, she might properly have been excused.
>
> But her answers did not do so. As to the penalty aspect of the test, she merely expressed disagreement with it. As to its guilt-or-innocence prong--if guilt or innocence be viewed as an issue of ultimate fact--she testified merely that the presence of the penalty would "affect" her deliberations, with little or no indication of how profound that effect would be. This was not enough. Further questioning, which was denied, might well have either revealed that she could lay her personal views aside, follow the court's instructions, and do her duty as a citizen or made unmistakably clear that she could not or would not do so. What her answers might have been will never be known. She was therefore prematurely excused, with the showing required by Witherspoon for her dismissal incomplete.

Burns v. Estelle, 626 F.2d 396,398 (5th Cir. 1980)

In the instant case, Venirewoman Holenda said,

> ...I don't believe that I could be impartial. I'm against capital punishment. (R2242-2243)(A24)

The trial court then inquired:

> THE COURT: Well, here again, as I indicated to Mr. Farmer, even though you are against capital punishment, the jury itself would not be imposing the same. You would be asked to reach a verdict based upon the testimony, the evidence, and the law based as to his guilt or innocence as to each of the charges, and then as to the punishment as it relates to capital punishment. You would then be asked to vote to advise the Court as to what the jury feels would be the proper punishment. I would not be bound by your opinion, however. (R2242-2243)(A24)

And, her final response was,

> VENIREWOMAN HOLENDA: I understand, but I do feel strongly about it. I'm sorry, but that's exactly how I feel. (R2242-2243) (A24-25)

Venirewoman Holenda's responses failed to make it unmistakably clear that she was irrevocably committed to vote against a death sentence recommendation or was unable to impartially try the issue of guilt. Her answers were equivocal and she was improperly excluded.

This Court is well aware of the increasing numbers of cases in which the death penalty has been imposed. As a concomitant, the applications of the standards announced in Witherspoon are increasing and the need for more definition in kinds of responses required for that "unmistakably clear" showing of inability to be impartial. Petitioner's case is an excellent vehicle for such a refinement of the law which is necessary to guide the trial judges of this country. Petitioner urges this Court to issue a Writ of Certiorari to review his case.

CONCLUSION

Upon the reasons expressed in this petition, Petitioner asks this Court to issue a Writ of Certiorari to the Supreme Court of Florida.

Respectfully submitted,

BY: William C. McLain

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Member Of The Bar Of The
United States Supreme Court

IN THE

SUPREME COURT OF THE UNITED STATES

Case No.

AMOS LEE KING,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

APPENDIX

Supreme Court of Florida

No. 52,185

AMOS LEE KING, Appellant,

v.

STATE OF FLORIDA, Appellee.

Received By

MAY 12 1980

Appellate Division
Public Defenders Office

[May 8, 1980]

PER CURIAM

The appellant Amos Lee King was convicted by a jury of the first-degree murder of Natalie Brady and of the offenses of escape, involuntary sexual battery, robbery, arson, and attempted first-degree murder of James McDonough. After a jury recommendation of death for the first-degree murder conviction, the trial judge imposed the death sentence. We have jurisdiction.[1] We affirm the convictions and the imposition of the death sentence.

The relevant facts are as follows. On March 18, 1976, the appellant was an inmate at the Tarpon Springs Community Correctional Center, a work release facility, serving a sentence for larceny of a firearm. On this date a routine bed check was

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[1] Art. V, § 3(b)(1), Fla. Const.

made by James McDonough, a prison counselor, at about 3:40 a.m. The appellant King was absent from his room. The counselor began a search of the building grounds and found the appellant outside the building. Appellant was wearing light-colored pants which had the crotch portion covered with blood. The counselor directed King back to the office control room inside the building. When the counselor turned to get handcuffs, King attacked him with a knife. A struggle ensued, and the counselor received several cuts and stab wounds. King left the office, then returned and found the counselor talking to his superior on the phone. He stabbed the counselor again and cut the telephone cord.

At approximately 4:05 a.m., the police and fire personnel arrived at the scene of a fire at a house approximately 1500 feet from the correctional center. The police officers discovered the body of Natalie Brady. She had received two stab wounds, bruises over the chin, and burns on the leg. An autopsy revealed other injuries, which included bruises on the back of the head, hemorrhaging of the brain, hemorrhaging of the neck, and broken cartilage in the neck. There was a ragged tear of the vagina, apparently caused by the wooden bloodstained knitting needles which were found at the scene, as well as evidence of forcible intercourse. Appellant's blood type was found in Brady's vaginal washings. The medical examiner attributed Mrs. Brady's death to multiple causes and established the time of death as 3:00 a.m. Arson investigators concluded that the fire was intentionally set at approximately 3:00 to 3:30 a.m.

An indictment charging King with the first-degree murder of Natalie Brady, together with the arson and robbery of her house, was returned by the grand jury. The state attorney filed a direct information, charging King with escape and the attempted murder of McDonough. Although the information and indictment

offenses were not consolidated, both were set for trial on July 5, 1977. Pretrial motions and orders were considered jointly, with one order being entered. On the date of trial, counsel for the defendant advised the court that he would not agree to a consolidation, and the court advised the state that it could proceed on either the indictment or the information offenses. The state initially elected to proceed on the information offenses but subsequently, on the basis of new authority under Florida Rule of Criminal Procedure 3.151, moved to consolidate. The motion was granted.

The jury found King guilty of all offenses and recommended the imposition of the death penalty for the first-degree murder. The trial judge immediately imposed the death penalty and subsequently filed written findings of fact in support of that decision.

Part I - Convictions

The appellant raises five challenges to the validity of his convictions.

Consolidation

Appellant's first argument is that the indictment offenses were improperly consolidated with the information offenses. Appellant contends that (1) no consolidation is proper without consent of the defendant, and (2) even if it is allowable, the request in this instance was so late as to be necessarily prejudicial.

Prior to July 1, 1977, the state was without authority to move for consolidation. On that date, an amendment to Florida Rule of Criminal Procedure 3.151 was adopted. After amendment, the rule stated: "(b) Two or more indictments or informations charging related offenses shall be consolidated for trial on a timely motion by a defendant or by the state."

(emphasis added.) The underlined amendment, allowing the state to request consolidation, was thus in effect at the time of the consolidation motion.

We find that the trial court was not in error in granting the consolidation motion. The record reflects that these two causes had been consistently treated as one during the course of pretrial proceedings and that counsel for appellant was prepared to try all offenses on the trial date. The state could not have moved to consolidate at an early stage of the case, as such a motion was not authorized until July 1. The consolidation caused no undue prejudice.

Further, the evidence of the attempted murder of the prison counselor and the appellant's escape from the prison complex would, in our view, be clearly admissible in the trial of the indictment offenses even if they had not been consolidated. Considering the manner in which these causes were treated prior to trial, the fact that counsel was fully prepared to try all offenses, and the fact that evidence for any of the offenses would have been admissible in whichever one was tried separately, we find that there was no prejudice to the appellant in this cause.

Presence of Cameras in the Courtroom

The appellant objected to the presence of television and still cameras at his trial and contends that (1) the presence of cameras in the courtroom is inherently prejudicial and (2) the presence of cameras produced negative effects in this case sufficient to warrant reversal. The contention that cameras in the courtroom are inherently prejudicial is without merit and has previously been expressly rejected by this Court.

Clark v. State, 379 So. 2d 97 (Fla. 1979); In Re Petition of Post-Newsweek Stations, Florida, 370 So. 2d 764 (Fla. 1979). With reference to the second point, we find that King has failed to demonstrate any specific denial of due process resulting from the presence of cameras in the courtroom during his trial. General allegations of prejudice are insufficient. The record reflects that the trial court was alert to any possible disruption or prejudicial effect the cameras might have had during the course of the trial. In response to certain objections and conclusory statements made by appellant's counsel concerning the cameras, the trial court stated: "I will not hesitate to have them removed from the courtroom." In denying the objections made by counsel for the appellant, the trial court stated:

> Mr. Rondolino, I have also been aware of their [cameras] presence. I have a much better view of their activities than you do. . . . I have also been aware of the jurors and from what I have been able to determine from the jurors their attentions have been devoted exclusively and entirely to the witnesses' testimony.

In our examination of this record, we find no demonstrated evidence of prejudice resulting from the presence of cameras during the course of the trial of this cause.

Juror Excused for Cause and Voir Dire Inquiry

The appellant contends that a prospective juror was improperly excused for cause after the following colloquy:

> THE COURT: Mrs. Holenda and Mrs. King, did I ask you these questions also with respect to the penalty?
>
> VENIREWOMAN HOLENDA: You didn't ask. I'm sorry, I don't believe that I could be impartial. I'm against capital punishment.

> THE COURT: Well, here again, as I indicated to Mr. Farmer, even though you are against capital punishment, the jury itself would not be imposing the same. You would be asked to reach a verdict based upon the testimony, the evidence, and the law based as to his guilt or innocence as to each of the charges, and then as to the punishment as it relates to capital punishment. You would then be asked to vote to advise the Court as to what the jury feels would be the proper punishment. I would not be bound by your opinion, however.
>
> VENIREWOMAN HOLENDA: I understand, but I do feel strongly about it. I'm sorry, but that's exactly how I feel.

After this juror was excused, a bench conference was requested, at which time counsel for the appellant and the state, together with the court, discussed the appropriate type of question that should be asked a prospective juror who appeared to oppose the imposition of the death penalty. The Witherspoon requirements were reviewed, and, at the conclusion of the conference, counsel for the appellant commented:

> MR. RONDOLINO: . . . I just wanted to make sure we aren't excluding a group of people that shouldn't be excluded from a jury trial. There's no--doesn't appear to be a serious problem at this time, but if it would continue, I think we'd get--
>
> THE COURT: What you are saying is that the question should be under no circumstances could they vote to impose the death penalty.
>
> MR. RONDOLINO: Right.

[Emphasis added.]

We faced a similar issue in Witt v. State, 342 So. 2d 497 (Fla. 1977), in which we stated:

> It is proper to exclude prospective jurors who "state that their reservations about capital punishment would prevent them from making an impartial decision as to the defendant's guilt . . . [or] who say they could never vote to impose the death penalty or that they would refuse even to consider its imposition in the case before them." Witherspoon v. Illinois, 391 U.S. 510, 513-14, 88 S. Ct. 1770, 1772, 20 L. Ed. 2nd 776, 780 (1968) (footnotes omitted).

See Portee v. State, 253 So. 2d 866 (Fla. 1971).

We find the venirewoman was properly excused. Her response to the court's inquiry was sufficient to indicate that her reservations about capital punishment would prevent her from making an impartial decision as to the defendant's guilt. See Jackson v. State, 366 So. 2d 752 (Fla. 1978). The record also clearly reflects that counsel did not object or believe there was a serious Witherspoon problem concerning this juror.

The appellant further argues that it was error for the trial judge to sustain an objection to appellant's general questioning of prospective jurors on voir dire. The controversial exchange was:

> MR. RONDOLINO: Mrs. Maltese, would you be in favor of having a mandatory death penalty for certain crimes?
>
> VENIREWOMAN MALTESE: No, sir.
>
> MR. RONDOLINO: Would anybody here be in favor of having a mandatory death penalty--
>
> MR. MEISSNER: Your Honor, I'm going to object. That's not proper voir dire.
>
> THE COURT: Sustained.

We find the form of inquiry to be improper. The question was asked collectively of the prospective jurors, and this is proper only if both the state and the defendant consent. See Fla. R. Crim. P. 3.300(b)(6). In addition, the objection also would have been sustainable on subject matter grounds. The purpose of voir dire examination is to obtain a fair and impartial jury to try the issues in the cause. Cross v. State, 89 Fla. 212, 102 So. 636 (1925). The subject question, however, did not address the juror's impartial application of existing law, but rather it concerned her conception of what laws should exist. We find the trial judge was clearly within his discretionary authority in sustaining the objection to the proposed inquiry.

Statements Against Interest

The final point raised by the appellant concerning his conviction involves statements, admitted over his objection, which he gave to two deputies subsequent to an alleged request

for counsel. The record indicates that there was conflicting but competent evidence to sustain a finding that no request for an attorney was made prior to the subject statements. The trial court did suppress certain other statements on the grounds that they were made after a request for counsel. We find no reversible error in the admission of the subject statements.

For the reasons expressed, we find the evidence clearly sufficient to sustain each of the convictions.

Part II - Sentencing

Non-Capital Sentencing Issues

The appellant contends that because the trial court imposed the death sentence for the felony murder of Natalie Brady, it could not also impose a judgment and sentence for the underlying felony of involuntary sexual battery. We agree. Where the underlying felony was an element of the felony murder, a defendant cannot be sentenced for both the underlying felony and the felony murder. Mahaun v. State, 377 So. 2d 1158 (Fla. 1979); State v. Wright, 379 So. 2d 96 (Fla. 1979); State v. Pinder, 375 So. 2d 836 (Fla. 1979). We find that appellant's sentence for involuntary sexual battery must be vacated.

The appellant also contends that the trial court erred in sentencing him to life imprisonment for the attempted first-degree murder of McDonough. Attempts to commit a capital felony are sentenced as first-degree felonies, which always carry a maximum sentence of thirty years absent a statutory provision authorizing life. There is no such authorizing statute for attempted first-degree murder, thus the sentence of life was improper. The state concedes error, and the appellant must therefore be remanded to the trial judge for resentencing for the offense of attempted first-degree murder.

Imposition of the Death Sentence

In imposing the death penalty, the trial judge found the following aggravating circumstances: (a) the crime was committed while the appellant was under sentence of imprisonment for larceny of a firearm [section 921.141(5)(a)]; (b) the appellant had previously been convicted of a felony involving the threat of violence to the person, specifically robbery [section 921.141(5)(b)]; (c) the appellant, in committing the crime of murder, further committed the offense of arson and thereby knowingly created a risk of death to other persons [section 921.141(5)(c)]; (d) at the time of committing the offense of first-degree murder, the appellant had committed burglary in the home of the victim [section 921.141(5)(d)]; (e) the crime for which the appellant was sentenced was heinous, atrocious, and cruel because of the total factual circumstances that resulted in the death of this sixty-seven-year-old victim [section 921.141(5)(h)]; (f) the appellant returned to the Tarpon Springs Correctional Facility where he attacked an unarmed counselor and stabbed him twenty times in the course of two attacks [section 921.141(5)(b)]. The trial court found the only mitigating circumstance to be the appellant's age of twenty-three years and held that the aggravating circumstances outweighed the mitigating circumstances.

Appellant contends that the statutory aggravating circumstance of knowingly creating a great risk of death to many persons, based upon the arson offense, was not justified because no person other than the murder victim was in the house at the time of the arson. We reject this contention and find that when the appellant intentionally set fire to the house, he should have reasonably foreseen that the blaze would pose a great risk to the neighbors, as well as the firefighters and the police who responded to the call.

Appellant next contends that the trial court erred in designating the attempted murder of the prison counselor as an aggravating circumstance, asserting that the stabbing cannot be considered a previous conviction for a violent felony because that conviction was returned jointly with the instant first-degree murder conviction. We disagree. The conviction for the attempted murder was a fact at the time the jury considered its recommendation to the trial judge and at the time the trial judge imposed the death sentence. Although the facts are not identical, an analogous result was reached in Elledge v. State, 346 So. 2d 998 (Fla. 1977), wherein the sentencing judge properly considered as an aggravating circumstance a murder committed later in time than the subject murder, but for which a conviction already had been obtained in a separate proceeding. The legislative intent is clear that any violent crime for which there was a conviction at the time of sentencing should be considered as an aggravating circumstance. Prior convictions in existence at the time of sentencing is a normal factor considered in all sentencing and is generally recognized as appropriate in sentencing guidelines. See ABA Sentencing Alternatives and Procedures (1979). We find the legislature intended that the attempted murder be considered as an aggravating factor in an instance of this type. In reaching this decision, we have not overlooked our decision in Meeks v. State, 339 So. 2d 186 (Fla. 1976). The convictions in Meeks are factually distinguishable from those in the instant case; however, to the extent there is conflict with Meeks, we hereby recede.

The appellant also contends that the trial court committed error by finding this murder heinous, atrocious, and cruel. The record evidence in this case clearly justifies this finding; the facts as stated in the beginning of this opinion speak for themselves.

Finally, appellant argues that the trial judge erred in immediately imposing the death penalty upon receipt of the jury's recommendation of death. Relying on Taylor v. State, 294 So. 2d 648 (Fla. 1974), appellant maintains that the judge should have afforded himself more time for deliberation for such an important decision. We do not find that the trial judge in this instance made a summary decision. A judge is not barred from considering and deliberating the aggravating and mitigating circumstances while the jury also deliberates.

The record reflects that at the conclusion of this case, on Friday, July 8, 1977, the judge asked counsel for the appellant whether he knew of any legal cause why sentence should not be imposed. Counsel offered no such cause. The judge then proceeded to impose the death penalty, consistent with the jury recommendation. At that time the judge stated that he would submit a written finding of the aggravating circumstances justifying the sentence on Monday, July 11. The sentencing order was in fact filed on the following Monday.

The trial judge did not make a summary decision in imposing the death sentence. His written findings reflect a specific application of the facts to the statutory aggravating and mitigating circumstances. There is no legal principle which bars the trial judge from considering the aggravating and mitigating circumstances while the jury similarly deliberates. The Taylor case is not controlling. In Taylor the trial judge imposed the death penalty despite a jury recommendation of life imprisonment. In ordering the death penalty, the judge gave no express consideration to the statutory sentencing factors and made no written findings as required by the statute. We find no reversible error in the sentencing procedure utilized by the trial court in the instant case.

Appellant's final point challenges the constitutionality of our death penalty statute on the basis of the United States Supreme Court decision in Lockett v. Ohio, 438 U.S. 586 (1978), on the asserted grounds that our statute limits consideration of mitigating factors. We have previously rejected this contention in our decision in Clark v. State, which expressly held that the statutory mitigating factors as stated in section 921.141(6) are not exclusive. The appellant in the instant case has advanced no mitigating factors which were ignored by the trial judge due to any misapplication or misconstruction of the statute. We find this contention without merit.

In accordance with the views expressed in this opinion, all of the appellant's convictions are affirmed. We agree that the death penalty is clearly an appropriate punishment in this cause, and therefore affirm the death sentence. We affirm the sentences imposed for escape, robbery, and arson. For the reasons expressed, we vacate the sentence imposed for the involuntary sexual battery and remand for resentencing for the offense of attempted first-degree murder.

It is so ordered.

ADKINS, BOYD, OVERTON and ALDERMAN, JJ., Concur
ENGLAND, C.J., and SUNDBERG, J., concur with the Court's affirmance of King's convictions, the Court's disposition of other sentences and, on the basis of Hargrave v. State, 366 so. 2d 1 (Fla. 1978), the affirmance of King's sentence of death

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

An Appeal from the Circuit Court in and for Pinellas County,

John S. Andrews, Judge - Case Nos. 77-1696 and 77-2173

Jack O. Johnson, Public Defender; and W. C. McLain, Assistant Public Defender, Bartow, Florida,

for Appellant

Jim Smith, Attorney General; and Richard G. Pippinger, Assistant Attorney General, Tampa, Florida,

for Appellee

Supreme Court of Florida

FRIDAY, SEPTEMBER 26, 1980

AMOS LEE KING,	*	
	*	
Appellant,	*	CASE NO. 52,185
	*	
v.	*	Circuit Court Nos. 77-1696 and 77-2173 (Pinellas)
	*	
STATE OF FLORIDA,	*	
	*	
Appellee.	*	
	*	
* * * * * * * * * * * * * * * * *		

Upon consideration of the Motion for Rehearing filed in the above styled cause by the attorney for Appellant,

IT IS ORDERED that said Motion be and the same is hereby denied, and it is further

ORDERED that the Petition for Rehearing filed by attorney for Appellee is granted on the soul issue of whether or not a defendant may be sentenced for both the underlying felony and the felony-murder. Relevent cases are: State v. Wright, 379 So.2d 96 (Fla. 1979); State v. Pinder, 375 So.2d 836 (Fla. 1979); Mahaun v. State, 377 So.2d 1158 (Fla. 1979); Whalen v. United States, ___U.S.___ (1980), (Case No. 78-5471, opinion filed April 16, 1980), 27 Crim. L. Rep. 3064; Harris v. Oklahoma, 433 U.S. 682; and Simpson v. United States, 435 U.S. 6.

Briefs on behalf of the Appellant and Appellee shall be served on or before October 13, 1980.

A True Copy

TEST:

Sid J. White
Clerk, Supreme Court

TC
cc: Hon. Harold Mullendore, Clerk
Hon. John S. Andrews, Judge

W. C. McLain, Esquire
Michael J. Kotler, Esquire

IN THE SUPREME COURT OF FLORIDA

THURSDAY, DECEMBER 11, 1980

AMOS LEE KING,	**	
Appellant,	**	CASE NO. 52,185
vs.	**	
STATE OF FLORIDA,	**	Circuit Court Nos. 77-1696 & 77-2173 (Pinellas)
Appellee.	**	

We granted appellee's petition for rehearing on the sole issue of whether or not a defendant may be sentenced from both the underlying felony and the felony of murder.

After consideration of supplemental briefs filed on behalf of appellant and appellee, we adhere to our original opinion.

A True Copy

TEST:

Sid J. White
Clerk Supreme Court

C
cc: Hon. Harold Mullendore, Clerk
Hon. John S. Andrews, Judge

W. C. McLain, Esquire
Robert J. Landry, Esquire

INDICTMENT

In the Circuit Court for the Sixth Judicial Circuit of Florida,
in and for Pinellas County

FALL TERM, in the year of our Lord one thousand nine hundred seventy-six

77-2173 CFC

THE STATE OF FLORIDA

vs.

AMOS LEE KING, Jr.

INDICTMENT FOR
MURDER IN THE FIRST DEGREE;
INVOLUNTARY SEXUAL BATTERY;
ARSON IN THE FIRST DEGREE;
BURGLARY.

FILED
APR 7 1977
HAROLD MULLENDORE
CLERK CIRCUIT COURT
By [illegible] Deputy Clerk

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF FLORIDA:

The Grand Jurors of the State of Florida, impaneled and sworn to inquire and true charge make in and for the body of the County of Pinellas, upon their oath do charge that

APPEARANCE
PLEA Not Guilty
CASE SET 5/24/77

AMOS LEE KING, Jr.

7/8/77 - Jury verdicts: Guilty each Count as charged

of the County of Pinellas and State of Florida, on the 18th day of March, 5/24/77 7/5/77

in the year of our Lord, one thousand nine hundred seventy-seven in the County and State aforesaid unlawfully, while engaged in the perpetration of, or in an attempt to perpetrate the crime of involuntary sexual battery, did beat and stab Natalie A. Brady, a human being, with a knife, thereby inflicting upon the said Natalie A. Brady mortal wounds of which said mortal wounds, and by the means aforesaid and as a direct result thereof, the said Natalie A. Brady died; contrary to Chapter 782.04(1)(a), Florida Statutes, and against the peace and dignity of the State of Florida.

Count Two

And the State Attorney aforesaid, under oath as aforesaid, further information makes that Amos Lee King, Jr., of the County of Pinellas, State of Florida, on the 18th day of March, in the year of our Lord, one thousand nine hundred seventy-seven, in the County and State aforesaid did commit a sexual battery upon Natalie A. Brady by inserting the penis of Amos Lee King, Jr. in the vagina of Natalie A. Brady, without the consent of Natalie A. Brady, and did in the process thereof use actual physical force likely to cause serious personal injury to the said Natalie A. Brady; contrary to Chapter 794.011(3), Florida Statutes, and against the peace and dignity of the State of Florida.

Count Three

And the State Attorney aforesaid, under oath as aforesaid, further information makes that Amos Lee King, Jr., of the County of Pinellas, State of Florida, on the 18th day of March, in the year of our Lord, one thousand nine hundred seventy-seven, in the County and State aforesaid willfully and maliciously by fire or explosive did damage that certain structure located at 218B, Route 1, Brady Road, Tarpon Springs, Pinellas County, Florida, knowing or having reasonable grounds to believe that a human being was in said structure; contrary to Chapter 806.01(1), Florida Statutes and against the peace and dignity of the State of Florida.

Count Four

And the State Attorney aforesaid, under oath as aforesaid, further information makes that Amos Lee King, Jr., of the County of Pinellas, State of Florida, on the 18th day of March, in the year of our Lord, one thousand nine hundred seventy-seven, in the County and State aforesaid unlawfully and without invitation or license did enter or remain in a structure, to-wit: the dwelling house of Natalie A. Brady, located at 218B, Route 1, Brady Road, Tarpon Springs, Pinellas County, Florida, the property of Natalie A. Brady, with intent to commit an offense, to-wit: involuntary sexual battery, and during the course thereof did make an assault upon Natalie A. Brady, the said structure not at the time open to the public;

contrary to Chapter 810.02, Florida Statutes, and against the peace and dignity of the State of Florida.

I, JAMES T. RUSSELL, State Attorney for the Sixth Judicial Circuit of Florida, have advised the Grand Jury returning the above Indictment, as authorized and required by law.

State Attorney for the Sixth Judicial Circuit of the State of Florida, prosecuting for said State.

Presented in open Court by the Grand Jury and filed this 7th day of April

A.D. 19 77.

HAROLD MULLENDORE
Clerk of the Circuit Court

By
Deputy Clerk

In Circuit Court
Sixth Judicial Circuit
Pinellas County, Florida

The State of Florida
vs.
AMOS LEE KING, Jr.

Indictment for
MURDER IN THE FIRST DEGREE;
INVOLUNTARY SEXUAL BATTERY;
ARSON IN THE FIRST DEGREE;
BURGLARY.

A TRUE BILL.

Foreman of the Grand Jury

State Attorney

The statute number of the most serious crime contained herein is

CLEARWATER TRIAL DIVISION

782.04(1)(a)/777.04

In the Circuit Court for the Sixth Judicial Circuit of Florida, in and for Pinellas County

FALL TERM, in the year of our Lord one thousand nine hundred seventy-six

77-1696C Ct. Cr.

STATE OF FLORIDA

vs.

AMOS LEE KING, Jr.

INFORMATION FOR

ATTEMPTED MURDER IN THE FIRST DEGREE; ESCAPE

FILED
MAR 21 1977
HAROLD MORRISON
CLERK CIRCUIT COURT
By Marcella Tunsell

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF FLORIDA:

JAMES T. RUSSELL, State Attorney for the Sixth Judicial Circuit of Florida, in and for Pinellas County, prosecuting for the State of Florida, in the said County, under oath, information makes that

AMOS LEE KING, Jr.

of the County of Pinellas and State of Florida, on the 18th day of March in the year of our Lord, one thousand nine hundred seventy-seven, in the County and State aforesaid. unlawfully and from a premeditated design, with the intent to effect the death of James D. McDonough, a human being, did stab the said James D. McDonough with a knife with the intent to commit Murder in the first Degree, thereby attempting to inflict upon the said James D. McDonough mortal woulds; contrary to Chapter 782.04(1)(a)/777.04 Florida Statutes and against the peace and dignity of the State of Florida.

Count Two

And the State Attorney aforesaid, under oath as aforesaid, further information makes that Amos Lee King, of the County of Pinellas, State of Florida, on the 18th day of March, in the year of our Lord, one thousand nine hundred seventy-seven, in the County and State aforesaid did unlawfully escape from his confinement as a prisoner from Tarpon Springs Community Correctional Center No. 72, a State penal institution, after being sent there from Brevard Correctional Institution, Sharpes, Florida, and after being adjudicated guilty of Larceny of a Firearm on August 13, 1975, a felony under the laws of the State of Florida, in the Circuit Court of Pinellas County, Clearwater, Florida, the sentence of which was four years in State Prison, less time spent in the County Jail of Pinellas County, Florida, to-wit: 84 days, which sentence commenced on August 13, 1975;

ARRAIGNED
APR 15 1977
Whether not guilty
PLEA
CASE SET 5/31/77
4/27/77 7/5/77

7/7/77 - Jury Verdict - Guilty as charged

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contrary to Chapter 944.40/945.091 Florida Statutes, and against the peace and dignity of the State of Florida.

STATE OF FLORIDA }

PINELLAS COUNTY }

Personally appeared before me JAMES T. RUSSELL, the undersigned State Attorney for the Sixth Judicial Circuit of Florida, in and for Pinellas County, or his duly designated Assistant State Attorney, who being first duly sworn, says that the allegations as set forth in the foregoing information are based upon facts that have been sworn to as true, and which if true, would constitute the offense therein charged; hence this information is filed in good faith in instituting this prosecution, and that testimony was received under oath from a material witness or witnesses.

Assistant State Attorney for the Sixth Judicial Circuit of the State of Florida, prosecuting for said State

Sworn to and subscribed before me this 21st day of March A.D. 19 77

(SEAL)

Notary Public

This information was prepared by the undersigned assistant state attorney from sworn testimony under oath from the material witness or witnesses in the case and the law enforcement officer's report attached hereto.

Assistant State Attorney

77-1696C Ct. Cr.

IN THE CIRCUIT COURT

IN AND FOR PINELLAS COUNTY

STATE OF FLORIDA

The State of Florida

vs.

AMOS LEE KING, Jr.

Information for

ATTEMPTED MURDER IN THE FIRST DEGREE; ESCAPE.

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JAMES T. RUSSELL

State Attorney

in the advisory sentence which you have just heard read by the clerk?

MRS. WADHAM: Yes, your Honor.

THE COURT: Members of the jury, at this time I want to sincerely thank you for the work you have done up here this week. I know it has been a very difficult week, the hours have been long, the listening to the testimony has been tedious and certainly much of it was as indicated, rather gory.

We all appreciate and recognize the difficulties that you have as jurors, especially on a case like this and also the great inconvenience that you and your families have been required to suffer. But, as you can well understand the jury system is the best system that we have been able to find over a period of several hundred years to resolve the differences that arise in our society so when you leave here I hope that you do leave with a better understanding of our court system and more of appreciation of jury service.

Again I want to thank you. They are excused at this time.

THE BAILIFF: Go out this way, please.

MR. MEISSNER: Your Honor, we have the alternates.

THE COURT: They were excused earlier.

The Defendant will stand before the Court.

Amos Lee King, Jr. in Case Number 76-2173, State of Florida against Amos Lee King, Jr., having been found guilty of murder in the first degree and there appearing to be no legal cause shown as to why sentence should not be imposed at this time, it is the judgment and sentence of this Court and, first of all, Mr. Cole, do you know of any legal cause why sentence shall not be imposed?

MR. COLE: Your Honor, no, personally, I don't know of any legal reason.

THE COURT: You, Amos Lee King, Jr. be and hereby are adjudicated and found to be guilty of the crime of murder in the first degree. It is ordered that you be committed to the custody of the Department Of Offender Rehabilitation and at a time and place to be later specified, you shall be put to death in a manner prescribed by law.

In count two of the same information, having been found guilty of the offense of

IN THE CIRCUIT COURT IN AND FOR PINELLAS COUNTY, FLORIDA

Circuit Criminal No. 77-2173

STATE OF FLORIDA :

VS : GRAND JURY INDICTMENT FOR FIRST DEGREE MURDER

AMOS LEE KING, JR. :

FILED
JUL 14 1977
CLERK CIRCUIT COURT
Deputy Clerk

COURT'S FINDING AS TO AGGRAVATING AND MITIGATING CIRCUMSTANCES RELATIVE TO THE SENTENCE IMPOSED

The Defendant, AMOS LEE KING, JR., was found guilty of the crime of First Degree Murder of one Natalie Brady, the verdict being returned on Friday, July 8, 1977. After the verdict was returned, the State and the Defendant were given an opportunity to present aggravating circumstances as to the imposition of the death penalty, and the Defendant was given an opportunity to present mitigating circumstances as to why the death penalty should not be imposed. The State introduced into evidence a prior conviction of Robbery in which a sentence was imposed by the trial judge at that time. The Defendant introduced a minister who had known the Defendant for approximately eighteen (18) years who stated in his opinion he was not a violent person. Both parties were then given an opportunity to argue their respective positions.

After approximately thirty (30) minutes of deliberation on the penalty phase of the trial, the jury returned a recommendation to the court that the death penalty should be imposed. The jury had written instructions as to what they should consider as to aggravating and mitigating circumstances which would guide them in their deliberation and their ultimate recommendation.

Upon receipt of the recommendations by the jury, the court immediately imposed a sentence of death.

In imposing the sentence provided by law, the court found:

(a) That the crime for which the Defendant was to be sentenced was committed while he was under sentence of imprisonment;

(b) That at the time of the crime for which he was sentenced the Defendant, AMOS LEE KING, JR., had been previously convicted of the offense of Robbery, from which he had been paroled; and was later sentenced for the offense of Larceny of a Firearm, the sentence which he was serving at the time of this offense;

(c) That the Defendant, AMOS LEE KING, JR., in committing the crime of Murder further committed the offense of Arson, for which he was found guilty by the same jury, and knowingly created a risk of death to other persons;

(d) That at the time of the offense of First Degree Murder the Defendant had committed a Burglary on the home of the victim, Natalie Brady;

(e) That the crime for which the Defendant was sentenced was heinous, attrocious and cruel. The testimony adduced at trial showed that the Defendant, while on work release from a Department of Offender Rehabilitation facility, left the facility and proceeded to the victim's home at approximately 2:40 a.m., burglarized her home, obtained a knife from her kitchen and also a pair of wooden knitting needles from her home, stabbed her repeatedly with the knife and prior to her death thrust one of the knitting needles up her vagina, after which he had sexual intercourse with the sixty-seven (67) year old victim. The testimony would further show that he then set her bed afire which subsequently engulfed the entire house. The medical testimony additionally showed that her death could have been caused by one of many factors: a karate chop to the throat, the testimony showing that the Defendant was a practitioner of the art of karate; blows to the head from an object which could have been a fist; loss of blood from the knitting needle thrust up the vagina; or shock; and

(f) That the Defendant then returned to the Tarpon Springs Correctional Work Release Facility where he attacked an unarmed counselor and stabbed him in the course of two attacks twenty (20) times.

The Court hereby finds that the aggravating circumstances outweigh any mitigating circumstances which was only the age of the Defendant, that being twenty-three (23) years of age. In considering the mitigating circumstances, the Court would further consider that the Defendant had been twice convicted and sentenced on felonies, one involving the use of violence to a person.

DONE AND ORDERED in Chambers, Clearwater, Pinellas County, Florida, this 11th day of July 1977.

JOHN S. ANDREWS
Circuit Judge

Copies furnished:

State Attorney
Public Defender

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verdict?

VENIREMAN CARTER: No, your Honor.

THE COURT: In other words, Mr. Farmer just candidly indicated to the Court that he could never vote -- that he could never reach a verdict with respect to an offense such as this. Do you feel that you could reach a verdict based upon the law and evidence?

VENIREMAN CARTER: Yes, sir.

THE COURT: Do you have any reason at this time that you could not serve fairly and impartially?

VENIREMAN CARTER: Not to my knowledge.

THE COURT: Mrs. Holenda and Mrs. King, did I ask you these questions also with respect to the penalty?

VENIREWOMAN HOLENDA: You didn't ask. I'm sorry, I don't believe that I could be impartial. I'm against capital punishment.

THE COURT: Well, here again, as I indicated to Mr. Farmer, even though you are against capital punishment, the jury itself would not be imposing the same. You would be asked to reach a verdict based upon the testimony, the evidence, and the law based as to his guilt or innocence as to each of the charges, and then as to the punishment as it relates to

capital punishment. You would then be asked to vote to advise the Court as to what the jury feels would be the proper punishment. I would not be bound by your opinion, however.

VENIREWOMAN HOLENDA: I understand, but I do feel strongly about it. I'm sorry, but that's exactly how I feel.

THE COURT: Okay. You may step down.

MR. RONDOLINO: May we approach the bench, Judge?

THE COURT: Yes, sir.

(The following proceedings were had at the bench without the hearing of the venire.)

MR. RONDOLINO: Your Honor, I think we may be getting into an area here that this is very serious, and we have seen the Court excuse two jurors because they indicated that they have scruples against the imposition of the death penalty.

THE COURT: Well, that's not why I excused them. The reason I excused them was they said they could not reach a verdict.

MR. COLE: The last one didn't say anything.

THE COURT: It was my impression she could never sit on a jury that -- tell me what the law is or what you are saying that it is if it is not cause.

MR. RONDOLINO: That's correct, Judge, unless a venireman states unambiguously that he would automatically vote against the imposition of capital punishment, no matter what the trial might reveal, it cannot be assumed that that is his position. I realize we have gotten pretty close to that.

THE COURT: How was it under the old law worded?

MR. RONDOLINO: This is Witherspoon, Judge.

THE COURT: The new capital punishment law?

MR. RONDOLINO: Well, you mean now that the court has as a penalty death penalty?

THE COURT: No, no. Was that under the bifurcated --

MR. RONDOLINO: That's correct. This is under bifurcated. This was Witherspoon. They reversed on the ground that -- they didn't reverse; they would not allow the death penalty to be imposed where members had been excluded from the panel. However, the court allowed the judgment as to guilt to stand.

I'd just like to be very clear if the persons excused -- that they would never be able to vote for death penalty in any circumstance. I think that's the standard that you will --

THE COURT: They are, though -- they are not voting for the death penalty; they are voting for

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SUPREME COURT, U.S.

80-6151

IN THE

SUPREME COURT OF THE UNITED STATES

Case No.

AMOS LEE KING,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The Petitioner, AMOS LEE KING, through his undersigned counsel and pursuant to United States Supreme Court Rule 46, asks this Court for leave to proceed in forma pauperis. The Petitioner has been represented by appointed counsel throughout his state court proceedings, and his Affidavit in support of this Motion is attached.

Respectfully submitted,

WILLIAM C. McLAIN
Assistant Public Defender
495 N. Carpenter Street
Bartow, Florida 33830
(813)533-6715 or 533-1184

BY: William C. McLain
WILLIAM C. McLAIN
Attorney for Petitioner

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SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

AMOS LEE KING,
Petitioner,
vs.
STATE OF FLORIDA,
Respondent.

CASE NO._____

AFFIDAVIT IN SUPPORT OF
PETITIONER'S MOTION TO PROCEED IN FORMA PAUPERIS

I, AMOS LEE KING, being first duly sworn, depose and say that I am the Petitioner in the above styled case; that in support of my motion to proceed on my Petition for Certiorari without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or give security therefor; and that I believe I am entitled to redress upon the issues presented in the Petition for Writ of Certiorari.

I further swear that:

1. I was convicted on July 11 , 1977, in the Circuit Court for Pinellas County, Florida, for first degree murder, sexual battery, escape, robbery, arson and attempted murder in a single jury trial.

2. I received a sentence of death for first degree murder and am presently in custody on Death Row at Florida State Prison.

3. I appealed to the Supreme Court of Florida and that Court affirmed all of my convictions and sentences, except the one for sexual battery.

4. I am not employed and have no source of income. I was last employed in 1977.

5. I do not have any real estate, stocks, bonds, notes, automobiles or any other valuable property.

6. I have been represented by appointed counsel throughout my state court proceedings.

I understand that a false statement or answer to any question in this Affidavit will subject me to penalties for perjury.

Amos Lee King
AMOS LEE KING

Subscribed and sworn to before me, a Notary Public, this 29 day of December, 1980.

Ricky X Mays
Notary Public

(SEAL)

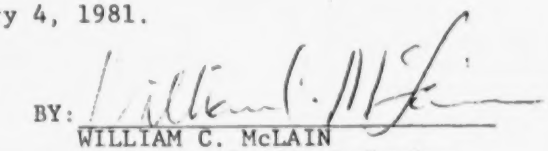
My Commission Expires:
NOTARY PUBLIC, STATE OF FLORIDA AT LARGE
MY COMMISSION EXPIRES SEPT. 15, 1984

CERTIFICATE OF SERVICE

I, WILLIAM C. McLAIN, a member of the Bar of the Supreme Court of the United States and counsel of record for AMOS LEE KING, the Petitioner, hereby certify that on February 4, 1981, pursuant to Supreme Court Rule 28, I served a single copy of the foregoing Motion for Leave to Proceed in Forma Pauperis on each of the parties as follows:

On the State of Florida, the Respondent, by depositing said copy in the United States Post Office, Bartow, Florida, with first class postage prepaid, properly addressed to CHARLES CORCES, JR., Assistant Attorney General, as counsel for Respondent, at Park Trammel Building, 1313 Tampa Street, 8th Floor, Tampa, Florida 33602.

All parties required to be served have been served this date, February 4, 1981.

BY: 

WILLIAM C. McLAIN
Assistant Public Defender

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FEB 17 1981
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IN THE

SUPREME COURT OF THE UNITED STATES

Case No. 80-6151

AMOS LEE KING,

Petitioner,

ORIGINAL COPY

vs.

STATE OF FLORIDA,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

QUESTION PRESENTED

Whether the trial court's excusal for cause of prospective jurors because of their expressed beliefs against the death penalty violated petitioner's rights under the Sixth and Fourteenth Amendments to the United States Constitution?

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OPINIONS BELOW

The opinion of the Supreme Court of Florida is reported at 390 So.2d 315 (Fla. 1980).

JURISDICTION OF THE SUPREME COURT

Respondent agrees that jurisdiction is properly invoked pursuant to 28 USC § 1257(3) and the Court can exercise jurisdiction to the extent that a substantial federal question is presented.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondent acknowledges that the constitutional provisions involved are the Sixth and Fourteenth Amendments of the United States Constitution. The statutory provision involved is F. S. 913.13 which is reproduced at Page 5 of the Petition.

STATEMENT OF THE CASE

Respondent accepts Petitioner's Statement of the Case as stated on pages five through seven of the petition but would add the following:

Trial defense counsel did not object to the excusal of juror Mrs. Holenda or seek to qualify her as required by state law. Moreover, after the juror stepped down defense counsel informed the court that he did not see a serious problem at that time. King v. State, 390 So.2d 315, at 319 (Fla. 1980). The challenge to Mrs. Holenda's excusal was initiated on appeal.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

Petitioner contends that the trial court's excusal of prospective juror Mrs. Holenda violated this court's ruling in Witherspoon v. Illinois, 391 U.S. 510, 20 L.Ed.2d 776 (1968) and that this court should grant his petition.

The petition should be denied because no substantial federal or constitutional question is presented. Petitioner

failed to object to the excusal of this prospective juror nor did he attempt to qualify her as required by state law. Paramore v. State, 229 So.2d 855 (Fla 1969), vacated on other grounds 408 U. S. 935; Brown v. State, 381 So.2d 690 (Fla. 1980) cert den _US_, 28 Cr.L.4164 (Case No. 80-5708, January 19, 1981). There is, therefore, an independent state ground precluding certiorari review. See Wainwright v. Sykes, 433 U. S. 72, 53 L.Ed. 2d 594 (1977). Not only did petitioner fail to contest the excusal of Mrs. Holenda, he also affirmatively told the trial judge that there was no serious problem at that time (R2246). King v. State, 390 So.2d 315, at 319 (Fla. 1980).

Quite apart from petitioner's procedural default on this point, the record reflects that the lower court was correct in finding that the juror sufficiently indicated her reservations about capital punishment would prevent her from making an impartial decision as to the guilt of the accused. A review of the complete colloquy between trial judge and potential jurors supports the conclusion of the lower court. For example Mrs. Holenda was sworn at R2236 and was among the group when the trial judge inquired at R2239:

> "The Court: Again I will direct this question to each of those of you who have just entered the box: As you are aware, one of the charges against this defendant carries a possible punishment of death in the electric chair. Do any of you have any conscientiously held opinions as to the death penalty that would prevent you from reaching a verdict?" (emphasis supplied)

Mrs. Holenda responded that she couldn't be impartial because of her capital punishment views. (R2242) Mrs. Holenda understood that the penalty recommendation was advisory, not binding on the trial court, yet reiterated her inability to follow the law. Her excusal was consistent with Witherspoon, supra, and Lockett v. Ohio, 438 U. S. 586, 57 L.Ed. 2d 973 (1978).

Respondent would further note that the role of the jury under Florida's capital sentencing procedure differs substantially from the role played by the jury under Texas law. In Florida, the jury only advises the court on sentencing, the recommendation is not binding. See Lamadline v. State, 303 So.2d 17 (Fla.1974); Hay v. State, 353 So2d 826 (Fla. 1977); State v. Dixon, 283 So.2d 1 (Fla. 1973). On the other hand, in Texas, if the jury answers affirmatively three statutory questions a death sentence must be imposed. To excuse a juror in Texas whose deliberation on any fact might be "affected" by capital punishment views is an impermissible expansion of the Witherspoon disqualification standard. Adams v. Texas, _US_, 65 L.Ed.2d 581 (1980). The juror's admission in Burns v. Estelle, 626 F2d 396 (5 Cir. 1980) that her capital punishment views would affect her deliberations did not constitute a concession she could not follow the state law (unlike the instant case).

The instant petition for writ of certiorari fails to present a substantial federal or constitutional question; accordingly, the petition should be denied.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL

Robert J. Landry
Assistant Attorney General
1313 Tampa Street, Suite 804
Park Trammell Building
Tampa, Florida 33602

Counsel for Respondent